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OGC 73-1777
19 September 1973

MEMORANDUM FOR: Chief, Procurement and Management Staff, OL

SUBJECT : Procurement Legislation

1. Your memorandum of 13 September 1973 requests our views on certain aspects of the proposed legislation to revise government procurement law. There are two bills, one being H.R. 9061 and the other a draft of 3 August 1973 prepared by the ASPR Committee under the chairmanship of the Pentagon (Captain Hopkins).

2. Both bills would repeal section 3 of the CIA Act; neither mentions section 8. A question thus is the extent to which the authority of section 8 would be affected by enactment of either bill. Additionally, the ASPR bill provides certain special authorities for procurement.

3. Section 3 of H.R. 9061 provides that unless "otherwise specifically provided herein, this Act applies to any contract of an executive agency for" the procurement of substantially anything. (It does exclude procurement of property "other than real property in being".) Whether that language would prevail over the likewise broad language of section 8 of the CIA Act that notwithstanding "any other provisions of law" sums available to the Agency may be expended for necessary purposes, is by no means certain. If the language were to be enacted, without additional provision to protect CIA authority, it might become necessary to resolve the question and indeed it is possible that the matter ultimately would be determined by litigation.

CRC, 3/5/2003

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In any event, it would certainly be wise at this stage to do what can be done, if anything, to prevent having the enactment of this legislation in any way erode section 8. An appropriate amendment of the bill could be sought, or at the very least, some legislative history created, which would support the view that section 8 is not to be impaired. Amendatory language could take the form of a single sentence to become the very last sentence of the bill, substantially as follows: "Nothing in this Act except the repeal of section 3 of the Central Intelligence Agency Act of 1949 shall be deemed to impair the authority of the Central Intelligence Agency." We made this recommendation to the Commission by letter of 1 September 1971, copy attached.

4. The ASPR bill, also in section 3, contains the same language quoted above from H.R. 9061 and the same conclusions and suggestions apply. But the ASPR bill also contains, in section 20, extraordinary contract authority not provided by H.R. 9061. Section 20(a) of the ASPR bill authorizes the President to authorize any federal agency to contract "without regard to other laws relating to the making, performance, or amendment of contracts". A contract or amendment for more than $50,000 may not be made under that subsection without approval by the agency head or by a "contract adjustment or other board". But the agency head may delegate this authority. See section 22. Section 20 would seem to provide ample opportunity for the President to grant to this Agency whatever procurement authority may be necessary. I suppose we should seek to amend the ASPR bill by the same language suggested for H.R. 9061, having in mind that section 20 may or may not survive. But if it does survive, the availability or unavailability of section 8 authority becomes much less important.

5. With reference to the specifics in your paragraph 2:

a. The reference to the Department of Defense contract and appropriated funds would mean that any contracts entered into by this Agency for the Department of Defense involving other than appropriated funds — if there are any such contracts — would not be subject to the Act. All other contracts entered into by or for the Agency would be.

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b. With reference to your inquiry concerning the requirement for formal advertising, the ASPR bill seems somewhat fuzzy or inconsistent. Section 6 permits special procedures for small purchase procurements. Section 7 provides that contracts not negotiated under section 6 shall be made by advertisement when, under departmental regulations, certain factors, including "national security interests", are appropriate for the use of formal advertising. Section 8 provides that except as provided by sections 6, 7, and 9, contracts "may be made" (emphasis supplied) by competitive negotiation under that section. And section 9 provides for contracting by noncompetitive negotiation when there is appropriate determination that "competition is impracticable". Thus, under section 7, we could conclude that national security considerations are such that advertising is not appropriate. This would permit competitive negotiation, as provided in section 8. And if "competition is impracticable" noncompetitive negotiation under section 9 could be utilized. Although the several sections, I believe, permit the conclusion that impracticability may derive from national security considerations, it would be well to modify section 9 to make certain that the bill so intends.

c. Section 15, I believe, does not require special consideration for Agency shipments. To the contrary, Agency contracts, like all other government contracts other than certain Department of Defense contracts, may not specify the size of containers. If we do want to be able to specify size, the Secretary of Defense, in some instances at least, might be willing and able to make the necessary determinations for us. Or we could suggest revising the language of section 15: "unless a department or agency head determines that military or national security requirements necessitate specification of container sizes."

d. With reference to the inspection by federal agencies authorized by section 19(a), it probably would be necessary to coordinate with the inspecting agency in order to preserve the security of classified Agency contracts.

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Similarly, the authority of the Comptroller General in section 19(c) would raise some problems in connection with protecting security and no doubt would adversely effect the Agency's position of excluding the Comptroller General from audit.

e. Section 20, I believe, would have no direct effect on section 8 of the CIA Act but, as mentioned in my fourth paragraph, section 20 and section 8 of the CIA Act to a considerable degree provide duplicative authority.

[redacted]

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Associate General Counsel

Attachment

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cc: [redacted]
w/background

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NTRAL INTELLIGENCE AGEN
WASHINGTON, D.C. 20505

1 September 1971

Mr. O. S. Hiestand
General Counsel
Commission on Government Procurement
1717 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Hiestand:

It was a pleasure to meet you last week and have the opportunity to discuss in general the work of the Commission, particularly as it may pertain to this Agency.

With respect to your letter received 22 July 1971, it was agreed that a reply in general terms would be an adequate response to the detailed questions set forth therein.

We feel that we would have no problem in carrying out our mission if section 3 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. 403c, were eliminated. In this connection, we believe that in all likelihood we could satisfactorily conduct most of our procurement under whatever provisions are recommended by the Commission to replace the authorities now at 41 U.S.C. 251-260 or 10 U.S.C. 2301-2314. However, for cases involving our unusual operating authorities or having security implications, it would be desirable to retain, in any legislation which might be enacted, a provision similar to that now at 40 U.S.C. 474(17).

We are in sympathy with the objectives of your Commission and will be glad to assist any way we can, but, as stated above, we would like to be assured of some flexibility in order to properly handle our special procurement situations.

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We repeat our offer to make available to your staff our computerized legal program.

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Sincerely,

[redacted]

John S. Warner
Acting General Counsel

CONCURRENCE:

John F. Blake by telephone 9/1/71
Director of Logistics

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Drafted: [redacted]
Retyped: OGC:jeb

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